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No. 99-166

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with the United States Constitution. One of its particular concerns is ensuring that all individuals, including the criminally accused and suspected, be ensured of the constitutional rights embodied in the Fifth Amendment clause that "No person ....shall be compelled in any criminal case to be a witness against himself."

SUMMARY OF ARGUMENT

The immunity statutes, 18 U.S.C. §§ 6001-6003, clearly provide use and derivative use immunity for both testimony and documents. When a witness is subpoenaed, refuses to provide documents pursuant to a proper assertion of the Fifth Amendment, and thereafter receives immunity pursuant to 18 U.S.C. § 6003, the

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

government cannot use that testimonial communication against the witness. Requiring a witness to turn over voluminous "personal and financial"[2] records (in this case "some 13,120 pages of documents and records") and then have those documents used as the basis for instituting a prosecution against the witness violates the unambiguous language of the immunity statute in addition to the Fifth Amendment privilege against self-incrimination.

The Fifth Amendment right against self-incrimination is crucial to preserving our adversarial process. It serves to safeguard against government abuse. The values embodied in the Fifth Amendment are jeopardized when the Government can use documents produced by a witness, pursuant to use/derivative use immunity, as the basis for a prosecution against this same witness. Permitting the Government to commence an investigation by requiring an individual to produce his or her documents improperly shifts the burden of producing evidence of guilt onto the accused.

If the Government has knowledge of the existence of these documents prior to issuing the subpoena and also has a basis, other than through the witness, for introducing them at trial, it should not be permitted to use the witness/defendant to obtain the documents. It is unnecessary to offer the witness immunity when there is another source from which to procure the documents. Alternatively, if the Government has no knowledge of the existence of these documents, then the production of the documents accruing from the witness' testimony represents a derivative use of the grant of immunity. If the Government has no knowledge of the existence of the specific documents then the documents should not be considered a foregone conclusion.

Entity documents and individuals producing documents as the custodian of a collective entity offer different concerns than an *individual* being asked to produce documents that will be used against the *individual*. Further a non-communicative taking by the

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[2] *United States v. Hubbell*, 167 F.3d 552, 563 (D.C. Cir. 1999).

Government, as one finds in cases where the government extracts an individual's blood or requires a handwriting exemplar, does not address the witness being given a grant of statutory immunity to procure testimony or information that serves as the basis for his or her indictment.

ARGUMENT

THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION PRECLUDES THE GOVERNMENT FROM USING DOCUMENTS THAT ARE PROVIDED BY AN INDIVIDUAL UNDER A GRANT OF IMMUNITY

A. THE CLEAR LANGUAGE OF 18 U.S.C. §§ 6002 AND 6003 PRECLUDES COMPELLED INFORMATION FROM BEING USED AGAINST AN INDIVIDUAL PROVIDED WITH IMMUNITY PURSUANT TO THESE STATUTES

In determining the scope of immunity, there is no legal justification to distinguish between that which is written and that which is spoken. Clearly the statute includes both. Immunity provided pursuant to 18 U.S.C. § 6002 specifically requires that

> no testimony *or other information* compelled under the order (or any information directly or *indirectly* derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Id. (emphasis added) By requesting that a court grant a witness immunity, federal prosecutors receive the benefit of a compelled communication in return for the guarantee that they will not use the information directly or indirectly in a later prosecution of the

individual providing the information.

"Courts in applying criminal law generally must follow the plain and unambiguous meaning of the statutory language." *United States v. Albertini*, 472 U.S. 675, 680 (1985). The clear language of 18 U.S.C. § 6002 includes the protection of "testimony *or* other information." The use of the disjunctive "or" emphasizes the clear congressional purpose to provide immunity for both testimony and information. (*See McNally v. United States*, 483 U.S. 350, 365 (1987)) (Stevens, J., joined by O'Connor, J., dissenting) (use of disjunctive "or" in mail fraud statute provides clear language). "Other information," as defined in 18 U.S.C. § 6001 "includes any book, paper, *document*, record, recording, or other material." (emphasis added). Immunity is not limited to oral testimony.

The present immunity statute was included as Part II of the Organized Crime Control Act of 1970. Its passage offered a unitary approach to immunity from what had been "a hodgepodge of existing immunity provisions tied to particular substantive statutes..."[3] Immunity affords prosecutors a bargaining tool to procure information necessary for prosecution that normally would be inaccessible because of the Fifth Amendment. "It is simply a fixed price that the Government must pay to obtain certain kinds of information..."[4]

Many of the self-incrimination cases, such as *Fisher v. United*

[3] Hearings Before Subcommittee No. 3 of the Committee on the Judiciary House of Representatives, 91st Cong., 1st Sess., H.R. 11157 and H.R. 12041, at p. 40 (Statement of Will Wilson, Assistant Attorney General, Criminal Division, Department of Justice). The provisions of Part II are similar to H.R. 11157. See Hearings Before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives, S. 30, 91st Cong. 2nd Sess., at p. 160, May 21, 1970 (Comments of Department of Justice on S.30 Organized Crime Control Act of 1969).

[4] Hearings Before Subcommittee No. 3 of the Committee on the Judiciary House of Representatives, 91st Cong., 1st Sess., H.R. 11157 and H.R. 12041, at p. 69 (Testimony of Professor Dixon).

States, 425 U.S. 391 (1976) and *United States v. Doe (Doe I)*, 465 U.S. 605 (1984), considered testimonial compulsion absent a grant of immunity.[5] In contrast, in *Kastigar v. United States*, 406 U.S. 441, 453 (1972), where immunity was provided, this Court recognized the importance of a grant of immunity, stating that it "prohibits the prosecutorial authorities from using the compelled testimony *in any respect*, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." (emphasis added).

There is no fear of this statute providing "immunity baths," such as an all-encompassing immunity to a witness for crimes not known to prosecutors. The statute does not offer transactional immunity and is limited to what is requested by the prosecutor. Thus, if a prosecutor desired documents that he or she intends to use against the witness producing them, he or she should secure the documents from another source.[6] The Government's inability to obtain the documents from someone other than the witness may implicate the Fifth Amendment's privilege against self-incrimination. As noted by this Court in *Doe I*, 465 U.S. at 616, "[t]he decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation."

Although some Court decisions may be seen to have moved away from providing full Fifth Amendment protection to documents produced via subpoena, the statute authorizing a court to compel the production of documents (18 U.S.C. § 6003) and to grant immunity

[5] The District Court's order states in part: "2. That Webster L. Hubbell is granted immunity to the extent allowed by law. *See United States v. Doe*, 465 U.S. 605 (1984) and *United States v. J.W.O.*, 940 F.2d 1165 (8th Cir. 1991)." (Jt. App., at 61).

[6] The prosecutor also has the option of obtaining these documents through an authorized search.

(18 U.S.C. § 6002) have remained intact.[7] When the Government elects to secure documents directly from a witness and to request that the court issue a grant of immunity, the clear language of the statute provides that the documents and any information derived therefrom cannot be used against the party provided with immunity. Since the documents do not arrive in the grand jury room "like manna from heaven,"[8] it is appropriate to provide the immunized individual presenting them to the grand jury with the full protection afforded by the immunity statute.

It is the prosecution and not the accused that has the burden of proving a defendant's guilt in a criminal case. The Government's burden of proof includes "[t]he burden of producing evidence." Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law 2nd* § 1.8, at p. 48 (1986). Having the accused give the very evidence that will be presented at trial improperly shifts the burden onto the defense. Limiting the immunity statute to only provide the Government with a benefit, an order compelling the production of the documents, with no corresponding benefit to the person providing the documents, permits the Government to use the accused to produce the very evidence that will serve as the basis of the Government's case against that individual.

To permit the Government to use the witness's *documents* would render meaningless the explicit word used in § 6001. The effect of such a reading would give prosecutors the option of commencing their cases by securing all documentation directly from the accused. With technological advancements this could result in the government securing massive amounts of information from a potential defendant's computer files and hard drives. Unlike a search, there would be no requirement of probable cause and no protection for the

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[7] *See United States v. Kastigar*, 406 U.S. 441, 462 (1972) ("The immunity therefore is coextensive with the privilege and suffices to supplant it.").

[8] *United States v. Hubbell*, 167 F.3d 552, 585, 602 (1999).

individual targeted by a prosecutor. In white collar cases that are predominantly documentary, immunity will be a nullity.

B. INFORMATION THAT IS DERIVATIVE OF THE IMMUNIZED ACT OF PRODUCTION CANNOT BE USED TO INCRIMINATE THE INDIVIDUAL PROVIDING THE INFORMATION

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.

Hoffman v. United States, 341 U.S. 479, 486 (1950). Although an immunized witness can still be prosecuted, the prosecution cannot use the immunized testimony directly or indirectly. Immunity permits prosecution only with "untainted evidence."[9] As the Government has long acknowledged, "[t]he practical difficulty of establishing that intended evidence is independently derived and not the fruit of compelled testimony will occasionally deter legally permissible presentations."[10]

The burden rests with the government to prove that "their evidence is not tainted by establishing that they had an independent,

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[9] National Commission on Reform of Federal Criminal Law, at p. 1405, Nov. 18, 1968 (Testimony of Professor Dixon). The proposed immunity reforms of the National Commission on Reform of Federal Criminal Laws served as the draft for the S. 30, Title II, Organized Crime Control Act of 1970.

[10] *See* Hearings Before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives, S. 30, 91st Cong. 2nd Sess., at p. 161, May 21, 1970 (Comments of Department of Justice on S.30 Organized Crime Control Act of 1969: Statement of Attorney General).

legitimate source for the disputed evidence." *Kastigar*, 406 U.S. at 460. Absent a hearing to determine the Government's independent knowledge, the Government's burden is not met. This is especially true when the finder of fact specifically determines that the evidence that would be used at trial was directly or indirectly derived from the documents produced by the witness/defendant pursuant to a grant of immunity.[11]

The Fifth Amendment right against self-incrimination clearly applies "when the accused is compelled to make a Testimonial Communication that is incriminating." *Fisher*, 425 U.S. at 408. Three communicative acts are involved in Mr. Hubbell's production of his documents. These are revealing the existence of the documents, establishing the witness's possession and control, and authentication of the documents.[12] In a case where immunity is granted, it is an improper derivative use for the prosecution "[a]rmed with that information and the documents produced," to use this information to "locate persons who either observed the individual preparing the documents or prepared them themselves under this supervision and are

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[11] *See* App. to Pet. for a Writ of Cert., at p. 130a. ("The independent counsel has indicted that a *Kastigar* hearing is unnecessary because he 'will make no bones about the fact that [he] did use the information provided by Mr. Hubbell pursuant to the production immunity.' Tr. Of Status Conf., June 2, 1998, at 8. He argues that the instant motion 'will rise and fall on the law.' *Id.*").

[12] Mr. Hubbell's production of documents was accompanied by an act of production. The act in this case involved testimony. Specific questions were asked of Mr. Hubbell at the time he produced these documents. Jt. Appendix p. 62-70. Some of the questions specifically asked of Mr. Hubbell were if he brought the requested documents (p. 62, 64), if he provided all the documents (p. 65, 66, 67, 68, 68), whether he understood everything that was being asked for (p. 69), whether he understood constructive possession (p. 67), whether he understood that he was required to produce documents within his constructive possession (p. 67), whether he withheld any documents premised on a privilege other then the attorney work product privilege (p. 70), and whether he had searched or "caused a thorough search to be made in response to this Subpoena." (p. 69). The receipt of the documents was derivative of this testimony.

thus able to authenticate them." Robert P. Mosteller, *Simplifying Subpoena Law:Taking the Fifth Amendment Seriously*, 73 Va. L. Rev. 1 (1987). Although prosecutors can avoid derivative use issues by showing an independent basis for their evidence, it is incumbent that the Government meet this burden. "[T]he requirement that the prosecution introduce independent proof to eliminate the possibility of improper use seems a modest price to pay for the protection of a witness' fifth amendment rights." *Id.* at 42.

The foregone conclusion test is often used by courts to determine whether there is compelled testimony. If the items produced "add[] little or nothing to the sum total of the Government's information" the question has been held to be one of surrender and not testimony. *Fisher*, 425 U.S. at 411. Recent lower court rulings generally require "that the foregone conclusion standard be met by the government 'demonstrat[ing] with reasonable particularity that it knows of the existence and location of subpoenaed documents.'" Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, 3 *Criminal Procedure 2nd* § 8.13, at 262-63 (1999) (*quoting In re Grand Jury Subpoena Duces Tecum, Dated Oct. 29, 1992*, 1 F.3d 87, 93 (2nd Cir. 1993). One cannot use the existence of mere categories of documents as a basis for contending the documents are a foregone conclusion if the Government does not know of the existence of the specific documents prior to the accused producing them.[13]

If the existence, possession, and authentication of the documents are a foregone conclusion, there is no implication to the Fifth Amendment and thus no necessity to provide immunity to the witness. *See Mosteller*, *supra*, at 48. If the government can establish the existence and location of the documents other then by using the defendant's testimonial act of production, there would be no need to use the defendant to produce them before the grand jury. Here again, the Fifth Amendment would not be violated and there would be no need to grant immunity to the witness. It degrades the very essence of

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[13] *See United States v. Hubbell* 167 F.3d 552, 581n. 36 (D.C. Cir. 1999).

this constitutional privilege to claim that it is more efficient to procure items from an accused through a grant of immunity than to obtain the items from other available sources.

If the Government does not know of the existence and location of these documents and only acquires that information from the witness who received immunity, then clearly the documents are derivative of the testimony provided by the witness. This violates both the Fifth Amendment and 18 U.S.C. § 6002.

C. THE FIFTH AMENDMENT PROTECTS AN INDIVIDUAL'S PRODUCTION OF DOCUMENTS FROM BEING USED AGAINST HIM OR HER

The Fifth Amendment provides that "No person ....shall be compelled in any criminal case to be a witness against himself." In *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964), this Court stated that "[t]he privilege against self-incrimination 'registers an important advance in the development of our liberty –'one of the greatest landmarks in man's struggle to make himself civilized." In *Murphy*, Justice Goldberg discussed the "fundamental values" that are advanced by the Fifth Amendment Privilege. These policies are not exclusive to oral testimony. Rather, they serve an equally important function in the context of compelled production of documents.

An individual producing papers can be subjected "to the cruel trilemma of self-accusation, perjury or contempt." *Id.* A compelled production of an individual's documents moves us further from "our preference for an accusatorial rather than an inquisitorial system of criminal justice." *Id.* Without Fifth Amendment protection, one forced to produce documents may be compelled to provide incriminating communication "elicited by inhumane treatment and abuses."*Id.* Forcing a witness, to produce documents that will be used against him or her, is in direct opposition to "our sense of fair play which dictates 'a fair state-individual balance requiring the government to leave the

individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." *Id.* Requiring an individual to produce "some 13,120 pages" of his or her documents and records does not advance a value of "respect for the inviolablity of the human personality."*Id.* Finally, it must also be remembered that while the privilege is "sometimes 'a shelter to the guilty' [it] is often 'a protection to the innocent." *Id.*

These values inherent in the Fifth Amendment right against self-incrimination are not implicated when the documents involve an entity, or an individual acting in a representative capacity to the entity. It is therefore warranted to differentiate between entities and individuals. *See* Peter J. Henning, *Finding What Was Lost: Sorting the Custodian's Privilege Against Self-Incrimination from the Compelled Production of Records*, 77 Neb. L. Rev. 34, 35 (1998). In *Braswell v. United States*, 487 U.S. 99, 117 (1988), this Court noted that requiring a grant of immunity to produce corporate records could have "serious consequences" should the government decide to prosecute the custodian.

Individuals and sole proprietors, however, clearly have a Fifth Amendment right when they are subpoenaed to produce records. *Id.* at 104-05. Absent a statutory grant of immunity, individuals cannot be compelled to produce business or personal records. *Doe I*, 465 at 617. The policy considerations inherent in the Fifth Amendment support this distinction.

The Fifth Amendment right against self-incrimination protects that which is *given* by an individual as opposed to that which is *taken* by the government. *See* Richard A. Nagareda, *Compulsion "To Be A Witness" And The Resurrection Of Boyd*, (to be published in 74 N.Y.U. L. Rev. 1575, 1621 (1999)). Professor Nagareda provides an extensive review of the historical context of the Fifth Amendment phrase "to be a witness," from state constitutions existing at the time of its ratification, a lone discussion when the First Congress debated the proposed Bill of Rights, and definitions of terminology used during this period. All provide strong evidence that this phrase "spoke in

terms of a right against compulsion either 'to give evidence' or, equivalently, 'to furnish evidence.'" *Id.* at 1605-09. "[T]he compelled giving of evidence (forbidden by the Fifth Amendment)" differs from "the taking thereof (regulated by the Fourth)." *Id.* at 1621. Thus, the Fifth Amendment privilege is inapplicable when the government takes evidence such as blood samples, *Schmerber v. California*, 384 U.S. 757 (1966).

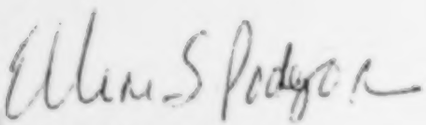
It is also apparent that while a compelled production may be present in cases such as *Schmerber* and *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplars), there is no accompanying testimonial communication that is incriminating. *Fisher*, 425 U.S. at 408. Thus, there is no need to provide immunity. Requiring an individual to provide his or her private documents to the government that are later used as the basis for an indictment against that individual, renders the giving of the papers a testimonial communication that is incriminating. In *Schmerber*, this Court stated that "[i]t is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." 384 U.S. at 763-64.

The Fifth Amendment right against self-incrimination is an important right to maintaining liberty. Finding the Fifth Amendment essentially inapplicable when an individual produces documents pursuant to a grant of use immunity will provide an exorbitant power to prosecutors. Permitting prosecutors authority under 18 U.S.C. §§ 6001-6003 to provide immunity and then use immunized testimony against a witness by claiming the documents are "manna from heaven," takes the act of production and makes that communication irrelevant. This contradicts this Court's holdings in *Fisher* and *Doe I*. It provides the Government with an incentive to immunize all witnesses, including targets. Prosecutors could shortcut investigations by simply making a witness produce the evidence that will serve as that person's indictment.

CONCLUSION

For the foregoing reasons, NACDL urges this Court to affirm the judgment of the Court of Appeals.

Respectfully Submitted,



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